Supreme Court, U.S.
FILED
DEC 6 [illegible]
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-613

In the Supreme Court of the United States

OCTOBER TERM, 1985

COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., PETITIONER

v.

THE TRAVELERS INSURANCE COMPANIES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner contends that respondent The Travelers Insurance Companies may be held liable for misrepresentations made in the course of its duties as a Medicare fiscal intermediary notwithstanding this Court's holding in *Heckler* v. *Community Health Services*, No. 83-56 (May 21, 1984), that petitioner could not reasonably have relied on those misrepresentations.

1. Petitioner Community Health Services of Crawford County, Inc. (CHS), a provider of home health care services, has participated in the Medicare program since 1966. Its Medicare payments are made through a fiscal intermediary, respondent The Travelers Insurance Companies (Travelers). Travelers erroneously advised petitioner between 1975 and 1977 that certain funds received by petitioner under the Comprehensive Employment and Training Act of 1973 (CETA), 29 U.S.C. (1976 ed. & Supp. V) 801 *et seq.*, were reimbursable under Medicare as

well, thus allowing petitioner the windfall of "being reimbursed twice for the same expense." Pet. App. 12a. When the Department of Health and Human Services became aware of petitioner's accounting practices in 1977, it advised Travelers that the CETA funds were not reimbursable. Pursuant to the Social Security Act and applicable regulations, Travelers reopened petitioner's earlier cost determinations in order to make the necessary retroactive adjustments and to recoup on behalf of the government overpayments of $71,480. *Id.* at 5a-7a; *Heckler* v. *Community Health Services*, No. 83-56 (May 21, 1984), slip op. 1-5.

Following an unsuccessful administrative challenge, petitioner commenced this action against Travelers and the Secretary of Health and Human Services in the United States District Court for the Western District of Pennsylvania, contending, inter alia, that the Secretary was estopped on the basis of Travelers' oral misstatements from recouping the overpayments and that Travelers was independently liable to it for whatever repayments by petitioner to the government were required. The district court granted summary judgment in favor of Travelers and the Secretary in an unreported memorandum opinion. Pet. App. 4a-19a. The district court concluded that the Secretary could not be estopped because petitioner could not reasonably have relied on Travelers' advice as final. *Id.* at 10a-12a. The district court also concluded that Travelers was entitled to official immunity from liability under Pennsylvania tort law for erroneous statements made in the course of its duties as a fiscal intermediary. *Id.* at 16a-17a.

The court of appeals reversed on the ground that the Secretary was estopped from recouping the overpayments. 698 F.2d 615 (1983). This Court granted the Secretary's petition for a writ of certiorari and reversed the judgment of the court of appeals. *Heckler* v. *Community Health*

Services, supra. The Court held that CHS could not estop the Secretary because Travelers' advice was not "given under circumstances that should have induced [CHS's] reliance." Slip op. 12. The Court reasoned that CHS should have known that final resolution of the reimbursement question rested with the Secretary and that Travelers' advice therefore could not be binding. *Id.* at 12-14.

On remand from this Court, the court of appeals entered an unpublished judgment order affirming the district court's grant of summary judgment in favor of the Secretary and Travelers. Pet. App. 1a-2a.

2. The order of the court of appeals, which, as petitioner recognizes (Pet. 5), "did not make a statement of the law," is manifestly correct and fully supported by state tort law. Further review is unwarranted.

Petitioner's tort action against Travelers could only succeed under Pennsylvania law if petitioner's reliance on Travelers' misstatements was reasonable. See Restatement (Second) of Torts §§ 537, 552 (1977); *Eisenberg* v. *Gagnon*, 766 F.2d 770, 778-779 (3d Cir. 1985); *Rempel* v. *Nationwide Life Ins. Co.*, 471 Pa. 404, 408, 370 A.2d 366, 367-368 (1977); *Mill-Mar, Inc.* v. *Stratham*, 278 Pa. Super. 296, 299, 420 A.2d 548, 550, appeal dismissed, 499 Pa. 219, 452 A.2d 1017 (1982). *Bowman* v. *Home Life Ins. Co.*, 260 F.2d 521 (3d Cir. 1958), on which petitioner relies (Pet. 12), is not to the contrary. See 260 F.2d at 523 ("once a party should be on notice, i.e., once his reliance is unreasonable, he acts at his own risk"). This Court has already held that petitioner's reliance was unreasonable. There is no need to revisit the question.[1]

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[1] The Court made clear in *Community Health Services* that CHS could not satisfy the requirements for estopping a private party. Slip op. 14. There is accordingly no reason to conclude that CHS's reliance might have been reasonable for purposes of its action against Travelers even though it was unreasonable for purposes of defending against recoupment by the Secretary.

In any event, Travelers is entitled to official immunity for state law torts resulting from discretionary acts taken within the scope of its duties as a fiscal intermediary under Medicare. See *Bushman* v. *Seiler*, 755 F.2d 653 (8th Cir. 1985); see also *Anderson* v. *Occidental Life Ins. Co.*, 727 F.2d 855 (9th Cir. 1984); *Matranga* v. *Travelers Ins. Co.*, 563 F.2d 677 (5th Cir. 1977). See generally *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807-808 (1982); *Butz* v. *Economou*, 438 U.S. 478, 495 (1978); *Barr* v. *Matteo*, 360 U.S. 564, 570-572 (1959) (plurality opinion).[2] In accordance with congressional intent, the Secretary's regulations specify that the Administrator of the Health Care Financing Administration is the "real party in interest in any litigation involving the administration of the [Medicare] program." 42 C.F.R. 421.5(b); see S. Rep. 89-404, 89th Cong., 1st Sess. Pt. I, at 54 (1965); 42 U.S.C. 1395h(i)(2); *United States* v. *Erika, Inc.*, 456 U.S. 201, 205-206 n.4 (1982).[3] It would lead to intolerable burdens on the Medicare program if intermediaries were liable for their misstatements to providers. Administrative and judicial review of reimbursement decisions is available, and petitioner took full advantage of those mechanisms. Congress surely did not intend to permit providers yet another bite at the apple through state law tort actions against fiscal intermediaries.

Petitioner argues (Pet. 7-8, 11-12) that official immunity is unavailable because Travelers was acting outside the scope of its authority. Petitioner confuses two distinct inquiries. It is true, as the Court held in *Community Health*

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[2] Petitioner's reliance (Pet. 18-19) on *Rochester Methodist Hosp.* v. *Travelers Ins. Co.*, 728 F.2d 1006, 1012-1016 (8th Cir. 1984), is unavailing. There, the court of appeals held only that a fiscal intermediary is not entitled to sovereign immunity. However, the Eighth Circuit later held in *Bushman* v. *Seiler*, *supra*, that intermediaries are entitled to official immunity, the doctrine here at issue.

[3] Accordingly, the government has represented Travelers throughout this litigation.

Services, that Travelers did not have authority to bind the Secretary. Slip op. 12-13 & n.21. The question for official immunity purposes, however, is not whether the agent's actions are binding on the government but whether they were "taken within the outer perimeter of [its] line of duty." *Barr* v. *Matteo*, 360 U.S. at 575 (plurality opinion). In requesting advice, petitioner dealt with Travelers in Travelers' official capacity as a fiscal intermediary. And Travelers' advice, though erroneous, plainly was within the scope of its duties as a fiscal intermediary to "provide consultative services" to health care providers and to "serve as a channel of communication." Pet. App. 16a. As the district court noted, "it is expected that the intermediary will give its opinion on unexpected questions that arise." *Id.* at 17a. Thus, although Travelers "could not *resolve* policy questions" (*Community Health Services*, slip op. 12 (emphasis added)), it was acting within the scope of its duties as a fiscal intermediary by offering its advice to petitioner on petitioner's request.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

DECEMBER 1985